

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SCOTT ERIC LUELLEN,

Plaintiff,

v.

JOE DEAN HODGE,

Defendant.

DECISION & ORDER

11-CV-6144P

Pursuant to 28 U.S.C. § 636(c), the parties have consented to have a United States magistrate judge conduct all further proceedings in this case, including the entry of final judgment. (Docket # 20). Currently pending before this Court is a motion for default judgment by plaintiff. (Docket # 31). Specifically, plaintiff contends that defendant failed to answer the complaint by August 2, 2011, or twenty-one days following the date of service on July 12, 2011, in violation of Federal Rule of Civil Procedure 12(a). (*Id.*). Defendant opposes the motion. (Docket # 32).

A review of the docket reveals the following. Plaintiff filed the instant action on March 21, 2011. (Docket # 1). On June 21, 2011, the district court granted plaintiff's motion to proceed *in forma pauperis* and ordered the United States Marshal to serve the summons and complaint. (Docket # 7). On July 8, 2011, a summons was issued. (Docket # 8). The United States Marshal mailed the summons on July 12, 2011 and included a form entitled "Statement of Service by Mail and Acknowledgment or Receipt by Mail of Summons and Complaint." (Docket # 14). That form explained that the summons and complaint were being served pursuant to Federal Rule of Civil Procedure 4(e)(1) and New York Civil Practice Law § 312-a. (*Id.*).

Defendant signed the acknowledgment form on August 10, 2011 and answered the complaint on August 18, 2011. (Docket ## 9, 14).

Under Rule 4 and N.Y. C.P.L.R. § 312-a, service may be effected by mailing a copy of the summons and complaint by first class mail. *See* Fed. R. Civ. P. 4(e)(1) (permitting service of a summons pursuant to state law); N.Y. C.P.L.R. § 312-a (permitting service by first class mail as alternative to other forms of personal service). Under New York law, a defendant may acknowledge service by mail within thirty days of receipt of the summons and complaint. N.Y. C.P.L.R. § 312-a(b)(1). Service is then complete on the date the signed acknowledgment is mailed or delivered to the sender. *Id.* The defendant must then answer the complaint within twenty-one days after service is complete. Fed. R. Civ. P. 12(a)(1)(A).

The United States Marshal mailed the summons and complaint on July 12, 2011. Defendant signed the acknowledgment form twenty-nine days later on August 10, 2011, within the deadline set forth under § 312-a. Accordingly, under Rule 12, defendant had until August 31, 2011, to answer the complaint. His answer was filed on August 18, 2011.

Thus, I find that defendant timely answered the complaint in compliance with Federal Rule of Civil Procedure 12(a), and plaintiff's motion for default (**Docket # 31**) is **DENIED.**

IT IS SO ORDERED.

s/Marian W. Payson

MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
December 12, 2011